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IN THE

Supreme Court of the United States

OCTOBER TERM 1957

CLARENCE RAYMOND COLLIER,
Appellant

v.

L. O. MILLER AND B. H. TIGNOR,
Appellees

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA AND APPENDIX

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Judgment of Supreme Court of Appeals of Virginia 1

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA AND APPENDIX

Your petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia entered in the above entitled case on November 27, 1957.

OPINIONS BELOW

No opinion was rendered by the Supreme Court of Appeals of Virginia.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was pronounced on November 27, 1957, by a written order, a copy of which is set forth in the Appendix. The jurisdiction of the Court is invoked under 28 U.S.C.A., Sec. 1257 (3).

QUESTIONS PRESENTED

(1) Whether petitioner's rights under the Due Process Clause of the 14th Amendment to the United States Constitution were violated when he was refused damages as a matter of law against two State of Virginia tax agents who falsely swore out a criminal warrant alleging that petitioner had failed to file his 1956 state income tax return based on 1955 earnings.

(2) Whether a civil service employee of the United States government can collect damages against two men, who were employed by the State of Virginia as income tax agents, who falsely swore out a criminal warrant alleging petitioner failed to file a 1956 state income tax return based on 1955 earnings, and whether petitioner has been denied the Equal Protection Clause of the 14th Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision which the case involves is the 14th Amendment to the United States Constitution, to-wit:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Virginia statute which the case involves is Sec. 58-115.1 of the Code of Virginia, to-wit:

"Notwithstanding any other provisions of this title and in addition to any other penalties provided by law, any person required under this article or under the next succeeding article to make a return of income, who wilfully fails or refuses to make such return, at the time or times required by law, and any person who, with intent to defraud the State, makes any false statement in any such return, shall be guilty of a misdemeanor, and upon conviction shall be confined in jail not exceeding one year, or fined not exceeding one thousand dollars, or both. A prosecution under this section shall be commenced within five years next after the commission of the offense."

STATEMENT OF THE CASE

I. Procedural History of the Case:

Petitioner filed a motion for judgment in the Court of Law and Chancery of the City of Norfolk, Virginia, demanding judgment in the sum of $10,000.00 for compensatory and punitive damages against L. O. Miller and B. H. Tignor on the ground that defendants ma-

liciously and without probable cause swore out a criminal warrant against petitioner alleging that petitioner violated Sec. 58-115.1 of the Code of Virginia. The defendant, L. O. Miller, filed an answer alleging that he was an agent of the State Tax Department of the Commonwealth of Virginia; that all of his acts in connection with the issuance of the criminal warrant were done by him in the performance of his official duties in accordance with the normal and customary practice of the said Tax Department and pursuant to instructions from his superior officers.

The case was tried before the Court and a jury on July 18, 1957. At the conclusion of the plaintiff's evidence, the defendants moved the Court to strike the plaintiff's evidence. This motion was overruled. At the conclusion of all of the evidence, the defendants renewed their motion to strike the plaintiff's evidence, and said motion was sustained. The Court directed the jury to return a verdict for the defendants.

Thereupon, the plaintiff moved the Court to set aside the verdict and grant a new trial. The motion was overruled, and final judgment was entered on the verdict, to which action the plaintiff duly excepted.

Petitioner filed a petition for a writ of error in the Supreme Court of Appeals of Virginia. Defendants filed a reply brief. On November 27, 1957, the Supreme Court of Appeals of Virginia denied the petition for a writ of error.

FACTS

The plaintiff, Clarence Raymond Collier, is and was a Civil Service employee, employed at the Naval Air Station, Norfolk, Virginia (Tr. pp. 10 and 15). On or about December 1, 1955, Mr. Collier moved from the City of Norfolk, Virginia, to Route 2, Box 184, Princess Anne County, Virginia (Tr. p. 10). Mr. Collier has resided continuously in Princess Anne County, Virginia, from December 1, 1955, to the present date.

Mr. Collier filed his 1956 state income tax return based upon 1955 earnings in March, 1956, with the Commissioner of Revenue at Princess Anne County, Virginia (Tr. p. 15). Mr. Collier paid his state income tax on November 27, 1956, and received a receipt from V. A. Etheridge, Treasurer, Princess Anne County, Virginia.

On February 13, 1957, between 10:30 p.m. and 11:00 p.m., two police officers of the City of Norfolk, Virginia, arrested Mr. Collier at his home, and gave him a copy of a warrant sworn out February 12, 1957 by defendants, L. O. Miller and B. H. Tignor (Tr. p. 10). The warrant stated that the defendants, Miller and Tignor, appeared before B. L. Smithwick, a Justice of the Peace of the City of Norfolk, Virginia, and made complaint on oath that Mr. Collier on May 2, 1956, and on other days, unlawfully violated Section 58-115.1 of the State Code, to-wit: that he did wilfully fail or refuse to file state income tax return for 1956, based on earnings of 1955. A certified copy of the warrant was introduced into evidence as plaintiff's Exhibit 1.

The police officers removed Mr. Collier from his home, put him in a police car, and took him to the Second Precinct Headquarters, Norfolk, Virginia, where he was finger printed and booked. Mr. Collier was released on bail bond from headquarters after 12:00 a.m. (Tr. pp. 12 and 13).

On February 14, 1957, the Police Justice of the City of Norfolk, Virginia, after hearing all of the evidence, dismissed the misdemeanor warrant which the defendants swore out against Mr. Collier (Tr. p. 14). A certified copy of the dismissal order was introduced into evidence as plaintiff's Exhibit 2.

Mr. Collier had never before been arrested in his life (Tr. p. 15). As a Civil Service employee, before he can gain promotion from one job to another, he must fill out and complete Civil Service Commission Form 60, a copy of which was introduced into evidence as plaintiff's Exhibit 3. Paragraph No. 23 of this form requires Mr. Collier to answer the question whether he had ever been arrested before and, if so, to give the details (Tr. p. 17).

Mr. Collier had never received notice from the Commissioner of Revenue or from the defendants that he did not file his 1956 state income tax return (Tr. p. 15).

Mrs. Zenobia Collier, wife of the plaintiff, who was present at the time Mr. Collier was arrested, corroborated the fact that Mr. Collier moved to Princess Anne County, Virginia, in December 1, 1955 (Tr. p. 21).

Mr. Ernest F. Buzzy, a next-door neighbor of Mr. Collier, the owner of a grocery store, testified that Mr. Collier moved to Princess Anne County, Virginia, either in November or December of 1955 (Tr. p. 29).

Many people who know Mr. Collier testified that Mr. Collier's reputation as a law-abiding citizen is very good.

After plaintiff rested his case and after the motion to strike the evidence was overruled (Tr. p. 32), the defendants put on five witnesses. Mr. W. R. Moore, Commissioner of Revenue for the City of Norfolk, Virginia, explained the method in his office pertaining to the filing of 1956 state income tax returns. According to Mr. Moore, every employer files information return by February 15, 1956, with the State Department of Taxation (Tr. p. 33). The information return lists the name and address of the employee. If the information return lists the address of the employee as Norfolk, the information return is sent from Richmond to Norfolk (Tr. p. 34). The tax returns are alphabetized, and then the bills are mailed by the City Treasurer (Tr. p. 35). After May 1, 1956, information returns are clipped on the 1956 state income tax return (Tr. p. 36). If the Commissioner of Revenue has no return, his office sends out a form letter (Tr. p. 37). The taxpayer's name and address are not typed upon the form letter which is merely placed in an envelope and presumably mailed. The form letter, amongst other things, asked the taxpayer whether he has filed a return with some other office of the Commissioner of Revenue. A copy of this form letter was introduced into evidence over objection as Exhibit D-1 (Tr. p. 41). If the Commissioner of Revenue in Norfolk receives no answer to this form

letter, his office then mails out a second form letter. Again, the name and address of the taxpayer are not typed upon this form letter which is placed in an envelope and presumably mailed. A copy of the second form letter was introduced into evidence over objection as Exhibit DX-2 (Tr. p. 44). When the form letters are mailed, a date stamp is placed on the information slip by the office of the Commissioner of Revenue at Norfolk (Tr. pp. 42, 45).

Mr. Moore testified that he had no personal knowledge that the form letters had ever been sent to Mr. Collier (Tr. p. 45). He testified that the purpose of filing a tax return on May 1, 1956, is to have payment by December 5, 1956 (Tr. p. 45).

Mr. A. C. Engram, a supervisor of tax examiners, was the supervisor in charge of the defendants, Miller and Tignor (Tr. p. 56). Mr. Engram testified that the state income tax return would reach Richmond about December 31, 1956. Over objection, he was permitted to testify that he had instructed the defendant, Miller, to search the records in the office of the Commissioner of Revenue at Norfolk to check the information slips and to swear out criminal warrants if there was no income tax return filed in the office of the Commissioner of Revenue at Norfolk (Tr. p. 61). Mr. Engram admitted that a delinquent taxpayer could be sued civilly (Tr. pp. 70 and 71). Mr. Engram also admitted that the State Department of Taxation in Richmond would have a file on Mr. Collier if his residence were known (Tr. p. 59).

Mr. Engram had no personal knowledge that the form letters had been sent to Mr. Collier from the office of the Commissioner of Revenue at Norfolk (Tr. p.

66). He also admitted that a 1956 state income tax return must be filed on May 1, 1956, in the city or county in which a person resides as of January 1, 1956 (Tr. p. 65). He stated that it was the practice to swear out a criminal warrant based solely upon the employer's information slips (Tr. p. 73).

Mr. Bruce L. Smithwick, Justice of the Peace who issued the warrant, testified that the defendant, Miller, instructed him to place the defendant's Tignor's name on the warrant even though Mr. Tignor did not appear personally before the Justice of the Peace (Tr. p. 78). Mr. Tignor himself testified that he had no objection to this procedure, and that his name had been placed on other criminal warrants prior to the issuance of this warrant against Mr. Collier (Tr. p. 110).

Mr. Leland R. Lee, a supervisor of individual incomes in the office of the Commissioner of Revenue at Norfolk, testified that he had no personal knowledge whether the two form letters were ever sent to Mr. Collier (Tr. p. 88). The information slip on Mr. Collier had stamped on it two dates, to-wit: 10/19/56 and 11/28/56 (Tr. p. 83). The information slip was introduced into evidence as Exhibit DX-3 (Tr. p. 84). Mr. Lee was unable to say which employee in the office of the Commissioner of Revenue had placed the dates on the information slip, nor was he able to say when he first saw the information slip (Tr. p. 85). Mr. Collier's address was not typed on the form letters, and no copy of the form letters was in the file of the Commissioner of Revenue (Tr. p. 88).

The defendant, Miller, a tax examiner for the state, testified that the information slip introduced as Exhibit DX-3 was turned over to him by the office of the Com-

missioner of Revenue at Norfolk sometime in January, 1957 (Tr. p. 97). He relied on the stamped dates on the information return although he saw no copy of any form letters sent to Mr. Collier (Tr. pp. 97 and 98). He testified that a pencilled notation on the information slip shows that Mr. Collier was dismissed in Police Court because he had a receipted tax bill from the Treasurer of Princess Anne County (Tr. p. 99).

Mr. Miller admitted that he had not written to Mr. Collier's employer at the Naval Air Station (Tr. p. 101); he did not check the phone book to verify Mr. Collier's address against the address listed on the information return (Tr. p. 101); he did not go out to Mr. Collier's reported address to see if he lived there (Tr. p. 102); he did not check with the Commissioner of Revenue at Princess Anne County or Norfolk County to see if Mr. Collier had filed income tax return there (Tr. p. 103); he did not contact the State Department of Taxation at Richmond, Virginia (Tr. p. 103); he made no inquiry as to who placed the stamped dates on the information return (Tr. p. 104). All that Mr. Miller did was to get out the criminal warrant against Mr. Collier after he saw two stamped dates on the employer's information slip (Tr. p. 101).

ARGUMENT

The Court overruled the motion of the defendants to strike the plaintiff's evidence after the plaintiff had rested (Tr. p. 32). Yet, the Court, after hearing the defendant's evidence, then sustained the motion to strike the plaintiff's evidence. While the defendant, Miller,

was testifying, the Trial Court remarked that it was a question for the jury to decide whether the defendants were justified in swearing out the criminal warrant (Tr. p. 95).

Section 58-105 of the Code of Virginia states that every resident individual shall file his return with the Commissioner of the Revenue for the county or city in which he resides. On January 1, 1956, Mr. Collier was residing in Princess Anne County. He properly filed his 1956 state income tax return in Princess Anne County prior to May 1, 1956, and duly paid his tax in November, 1956.

Section 58-108 of the Code of Virginia states that all returns of individual income shall be made on or before the first day of May in each year. Section 58-112 of the Code of Virginia recites that the Commissioner of Revenue shall forward such returns to the Department of Taxation as soon as returns have been received and entered upon the assessment books.

The defendants swore out the criminal warrant because they saw two stamped dates on the employer's information return on Mr. Collier. They saw no copy of any form letter mailed to Mr. Collier by the Commissioner of Revenue at Norfolk. They made no inquiry from Mr. Collier's employer or from Mr. Collier himself or from the Commissioner of Revenue at Princess Anne County or Norfolk County or from the State Department of Taxation in Richmond. In fact, they did not even consult the local telephone book for Mr. Collier's address.

It is sincerely urged that reasonable minded men could differ and that it was a question of fact for the jury to determine whether the defendants had probable

cause to believe that Mr. Collier on May 2, 1956, had wilfully failed or refused to file his state income tax return for 1956 based on earnings of 1955. The defendants made no inquiry and did not find out who in the office of the Commissioner of Revenue at Norfolk had placed the stamped dates on the employer's information return and when they had done it.

In *Munger v. Cox,* 146 Va. 574, 131 S.E. 841, the Court held that only slight proof is required to prove lack of probable cause.

In *Jones v. Finch,* 84 Va. 204, it was held that the judgment of a justice dismissing the complaint is prima facie evidence of lack of probable cause for the prosecution.

In *Munger v. Cox,* 146 Va. 574, 131 S.E. 841, the Court held that the advice of a layman does not constitute probable cause. It will be noted that one of the defenses is that Mr. Engram, the supervisor, had instructed the defendants to swear out criminal warrants.

The Supreme Court of Appeals of Virginia has held in many cases that lack of probable cause and malice in actions for malicious prosecution are usually questions of fact for the jury (*Commander v. Provident Relief Assn.,* 126 Va. 455; *Evans v. Michaelson,* 146 Va. 64, 135 S.E. 683; and *Clinchfield Coal Corp v. Redd,* 123 Va. 420, 96 S.E. 836).

In *64 C.J.S., Municipal Corporations,* Section 2110 at page 922, it is stated that an action to recover damages for malicious prosecution may be maintained against municipal officers who are guilty of malicious acts in the collection of municipal taxes.

This case involves a real hardship to the plaintiff who, for the rest of his life, must, as a Civil Service employee, state on official United States government application forms the circumstances why he was arrested on this particular occasion. It could very easily impair his chances for promotion. If the defendants as a matter of law had probable cause to believe plaintiff had committed a crime, then the defendants and all tax collectors could insulate themselves from actions for damages resulting from their unlawful act simply by saying that they had looked at an employer's information return and had seen two stamped dates placed thereon. It is submitted that the jury should resolve the questions of probable cause and malice.

It is submitted that petitioner's rights under the 14th Amendment to the United States Constitution have been violated by the refusal of the state courts to let a jury decide on damages against state tax agents who falsely serve out a criminal warrant against a civil service employee of the United States Government.

Petitioner respectfully requests that a writ of certiorari issue to the Supreme Court of Appeals of Virginia.

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APPENDIX

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme of Appeals Building in the City of Richmond on Wednesday the 27th day of November, 1957.

The petition of Clarence Raymond Collier for a writ of error to a judgment rendered by the Court of Law and Chancery of the City of Norfolk on the 18th day of July, 1957, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and L. O. Miller and another were defendants, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the Court being of opinion that the said judgment is plainly right, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said Law and Chancery Court.

A Copy—Teste:

H. G. TURNER, *Clerk*

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In the

Supreme Court of the United States

October Term 1957

No. 805

CLARENCE RAYMOND COLLIER,
Appellant

v.

L. O. MILLER AND B. H. TIGNOR,
Appellees

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

The Petition for Writ of Certiorari Does Not Comply With Paragraph (f) of Rule 23 of This Court

Paragraph (f) of Rule 23 of the Rules of this Court requires that

> "* * * the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary

> thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will *show that the federal question was timely and properly raised* so as to give this court jurisdiction to review the judgment on writ of certiorari." (Italics supplied)

Neither Petitioner's "Statement of the Case", which is set forth on the third and fourth pages of the Petition, nor any other portion of his Petition, specifies the stage in the proceedings below at which, or the manner in which, the supposed federal question was raised. Nowhere does Petitioner make any quotation from the Record, or any summary thereof or reference thereto, showing that such federal question "was timely and properly raised". On the contrary, the Petition as a whole correctly indicates that the presence of a federal question, if suspected, was never suggested in either the court of first instance or the appellate court below.

II.

The Petition Shows on Its Face That No Substantial Federal Question Is Involved

The substance of Petitioner's complaint is that the question of his right to recover against the defendants should have been submitted to the jury:

> "It is sincerely urged that reasonable minded men could differ and that it was a question of fact for the jury to determine whether the defendants had probable cause to believe that Mr. Collier on May 2, 1956, had wilfully failed or refused to file his state income tax return for 1956 based on earnings of 1955 * * *" (Petition, at pages 11-12)

If it was error to direct a verdict for the defendants, it was at most an erroneous application of the laws of Virginia determining which questions shall be decided by the court and which by the jury. Virginia is perfectly free to eliminate juries altogether in civil cases. *Walker* v. *Sauvinet,* 92 U. S. 90; *Hardware Dealers Mutual Fire Insurance Company of Wisconsin* v. *Glidden Co.,* 284 U. S. 151. Since the state may constitutionally permit the trial judge to decide all civil cases, under all conceivable evidence, without intervention of a jury, *a fortiori* it may permit him to do so on the evidence in Petitioner's case.

Furthermore under any view of the Petition it asserts only that Virginia has failed to afford Petitioner a legal right of action against other private individuals on a given state of facts. The Federal Constitution has never been, and we submit never can be construed to require any State to create or preserve any such right between one citizen and another. We can conceive of no federal constitutional limitation upon the power of any state to abolish altogether the common law action of malicious prosecution and all of its modern descendants in every form.

Conclusion

For the reasons hereinabove set forth, it is respectfully submitted that certiorari should be denied.

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